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UNLOCKING ASEAN'S LEGAL CAGE: ULTRA VIRES, INSTITUTIONAL PARALYSIS, AND HUMAN RIGHTS IMPUNITY

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Abstract

This article rigorously investigates the profound institutional and legal limitations paralyzing the ASEAN Intergovernmental Commission on Human Rights (AICHR). Utilizing a doctrinal legal research methodology, the study critically analyzes the normative conflict between the ASEAN Charter and the AICHR Terms of Reference (TOR). The findings reveal that the AICHR TOR unlawfully dilutes the mandatory protection mandate established in Article 14 of the ASEAN Charter. Consequently, creating the AICHR TOR constitutes an ultra vires act that deliberately undermines regional human rights enforcement. Furthermore, the strict application of non-interference principles and consensus-based decision-making constructs a restrictive legal cage, actively granting abusive states an implicit veto to block vital investigations. This deliberate structural failure fosters a deeply entrenched culture of impunity and exacerbates the severe justice deficit across Southeast Asian societies. To dismantle these formidable socio-legal barriers, the research urgently recommends elevating the AICHR TOR into a legally binding protocol. Additionally, adopting a Qualified Majority Voting mechanism is essential to override consensus rules in cases involving gross human rights violations and state-sponsored crimes.

Keywords: ASEAN Human Rights, Ultra Vires Doctrine, Institutional Paralysis, Culture of Impunity, Normative Hierarchy

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Introduction

Since its establishment in 1967, the Association of Southeast Asian Nations (ASEAN) has operated as a political pact led by informal diplomacy and the ASEAN Way. However, the Association's official adoption of the ASEAN Charter in 2007 reestablished it as a rules-based intergovernmental organization (Woon, 2017). Under the ASEAN Charter, ASEAN commits to a human rights mission based on the rule of law. In particular, Article 1(7) states ASEAN's purpose of strengthening democracy, enhancing good governance, and promoting and protecting fundamental freedoms. In contrast, Article 14 clearly requires establishing a human rights body (ASEAN Intergovernmental Commission on Human Rights, 2016). Although this is a constitutional promise, establishing the ASEAN Intergovernmental Commission on Human Rights (AICHR) under the AICHR Terms of Reference (AICHR TOR) has created a normative inconsistency in the hierarchy of ASEAN legal norms. In a functional legal system, a subordinate instrument (*lex inferior*) must align logically with a superior constitutional instrument (*lex superior*) (Tahvanainen, 2006; Shaw, 2021). In practice, the AICHR TOR, as a *lex inferior*, has been used to override the supreme mandate in Article 14 of the ASEAN Charter, a *lex superior*. This conflict of law has created an *ultra vires* act, which is an exercise of power beyond legal authority, and forces the AICHR into a condition of institutional paralysis (Duxbury & Hsien-Li, 2019; Hara, 2019; Huck, 2020; Rachminawati, 2022; Jones, 2025). This legal cage is not just a lack of political will; it is calculated legal malpractice aimed at preserving state sovereignty in human rights commitments. Serious cases have clearly shown the institutional ineffectiveness of the ASEAN human rights body, especially the gross human rights violations against the Rohingya following the 2021 Myanmar military coup. Consequently, this failure highlights a significant conflict. It shows the disconnect between the highest constitutional framework offered by the ASEAN Charter and the reality on the ground, as the AICHR TOR states.

This research critically examines the structural and normative inconsistencies within ASEAN's legal framework that have systematically paralyzed the AICHR, effectively preventing it from executing its protective mandate. Within the broader context of Asian crime and society, this institutional paralysis transcends a mere theoretical paradox in international law; it acts as a profound socio-legal barrier to accountability. When a regional body is legally constrained from taking protective action, a culture of impunity inevitably flourishes. State actors are thereby empowered to commit gross human rights violations without the risk of regional legal intervention, resulting in the severe victimization of vulnerable populations. Consequently, the AICHR's legal defects directly widen the justice deficit in Southeast Asia, leaving victims unprotected when states weaponize their domestic legal systems. Therefore, analyzing and dismantling this legal paralysis is essential to advancing human rights protection across the region.

Challenging the prevailing academic assumption that the AICHR's ineffectiveness reflects merely a lack of political will (Leviter, 2011; Fitriyah & Hamdan, 2025), this research advances the literature by shifting the analytical focus to rigorous doctrinal legal analysis. The central hypothesis asserts that the AICHR's institutional deadlock is a carefully calculated jurisprudential design failure. First, the study contends that the AICHR TOR fundamentally subverts the *lex superior* mandate of the ASEAN Charter by severely diluting human rights protection, rendering its execution an *ultra vires* act. Second, it demonstrates how strict adherence to the principles of non-interference and consensus systematically constructs a restrictive legal cage, granting abusive states an implicit veto over human rights interventions. To address these issues systematically, this research investigates whether the AICHR TOR constitutes an *ultra vires* act that violates the hierarchy of norms, and whether its consensus decision-making mode creates a structural obstacle that prioritizes state sovereignty over human rights enforcement. Ultimately, to unlock this legal cage, the research proposes

actionable legal remedies, including elevating the AICHR TOR to a legally binding protocol and adopting Qualified Majority Voting (QMV) in cases of gross human rights violations.

Literature Review

To build a robust academic foundation for assessing the AICHR's institutional paralysis, this study systematically reviews the literature on ASEAN human rights frameworks. By critically analyzing established international legal concepts of normative hierarchies and institutional constraints, this section outlines prevailing scholarly debates and identifies the jurisprudential gaps the current research seeks to address.

The AICHR Debate: Promotional and Protective Mandates

Since its establishment, the AICHR has faced significant academic evaluation, mainly concerning its functional role. Much of the literature has criticized the AICHR as a toothless institution more interested in promoting human rights than protecting them. For example, Leviter (2011) and Jones (2025) argue that although the ASEAN Charter is legally binding, it rests on compromises that place state sovereignty above implementing human rights. Similarly, Rachminawati (2022) questions the usefulness of the AICHR, arguing that it is an unwanted institution formed under external influence rather than genuine regional will. In this scholarly discussion, scholars of international relations and political science often attribute the AICHR's protective ineffectiveness to a lack of political will and the informal practices of the ASEAN Way (Duxbury & Hsien-Li, 2019; Hara, 2019; Huck, 2020). He (2016) compares the European Union's supranational legal structure with ASEAN, noting that ASEAN intentionally favors intergovernmental diplomacy over regional legal integration. Although these studies correctly identify signs of the AICHR's failure, they rely mainly on a political approach. As a result, they pay little attention to the strict doctrinal legal frameworks governing the institution.

Normative Hierarchies and the Ultra Vires Doctrine in International Law

In general, the principle of normative hierarchy is a fundamental element in general international law. The doctrine of *lex superior derogat legi inferiori* (the higher law overrides the lower law) confirms that subordinate administrative acts, terms of reference, or subordinate treaties do not breach an international organization's highest constitutional rules. Whenever an international institution has a body that acts beyond the powers expressly conferred by its founding document, such acts are subject to the doctrine of *ultra vires* (acting beyond the powers). Although scholars use the *ultra vires* concept primarily to analyze the United Nations Security Council or the European Commission, its use in the ASEAN context is very limited (Gasbarri, 2021; Shaw, 2021). With the creation of the ASEAN Charter, ASEAN became a rules-based intergovernmental organization with a definite constitutional hierarchy (Woon, 2017). However, the existing legal literature has largely failed to compare the AICHR TOR with the highest constitutional standard. Although scholars acknowledge the weaknesses of the AICHR TOR, they rarely describe its establishment by the ASEAN Foreign Ministers as *ultra vires* and an unlawful breach of the Charter's higher mandate.

Principle of Non-interference, Consensus, and the Asian Context

The second major pillar of the literature examines the operating limitations of ASEAN institutions. Academic literature consistently cites Article 20 (Consensus) and Article 2 (Non-interference) as hallmarks of Asian regionalism. On the Rohingya crisis, Limsiritong & Sookhakich (2025) highlight the AICHR's jurisdictional limits, showing how non-interference obstructs decisive regional responses. Moreover, the systemic implications of these norms are harsh in the context of Asian human rights and crime. Current socio-legal studies note that strict implementation of the consensus principle is a sure way to shield offending states from investigation in cases of state-sponsored violence (Hara, 2019). This in turn creates a condition of impunity in the region. This directly contributes to the ongoing suffering of weak groups and a growing justice gap in Southeast Asia.

Research Gaps and the Contribution of this Study

A comprehensive analysis of the existing literature reveals a distinct theoretical and methodological gap. The literature lacks direct doctrinal legal analysis explaining the AICHR's failure as a deliberate jurisprudential design error. This research directly addresses this critical void. Rather than reiterating conventional political arguments regarding ASEAN's lack of political will, this study systematically applies the *lex superior* and *ultra vires* doctrines to the AICHR TOR. In doing so, it demonstrates with legal precision how the mechanism was structurally designed to malfunction. Furthermore, while previous literature frequently treats consensus merely as a diplomatic barrier, this research theoretically frames it as a restrictive legal cage and an implicit veto that systematically guarantees institutional paralysis. By elevating the academic discourse through rigorous legal reasoning and proposing concrete structural reforms such as Qualified Majority Voting (QMV), this research offers a pragmatic blueprint to unlock ASEAN's legal cage, dismantle the entrenched culture of human rights impunity, and definitively overcome socio-legal obstacles in Southeast Asia.

Research Methodology

To address the research questions systematically, this study employed a doctrinal legal research methodology, specifically a black-letter law approach. This rigorous method required systematically identifying, analyzing, and synthesizing legal concepts, doctrines, and rules from primary and secondary sources to resolve specific legal inconsistencies. By adopting this jurisprudential approach, the study deliberately shifted analytical weight away from the conventional political science perspectives common in ASEAN studies, firmly grounding the research in pure legal doctrine. Viewing ASEAN strictly as a rules-based intergovernmental organization enabled a precise assessment of the legal instruments and structural weaknesses that effectively paralyze the AICHR.

The analysis utilized a carefully curated collection of primary international documents. These included the ASEAN Charter (2008), analyzed as the region's supreme constitutional document—specifically Article 14 (the mandate to create a human rights body), Article 20(1) (consensus-based decision-making), and Article 2(2)(e) (the principle of non-interference). Additionally, the AICHR Terms of Reference (2009) was scrutinized as the subordinate legal text establishing the AICHR's practical functions and operational boundaries, while the Vienna Convention on the Law of Treaties (VCLT 1969) served as the universal hermeneutic guide for objectively determining textual meaning and state obligations under international law.

The doctrinal analysis followed a systematic three-stage framework. Initially, a textual analysis established the normative hierarchy, utilizing the VCLT to confirm the ASEAN Charter's status as *lex superior* (supreme law) and categorizing the subsequently drafted AICHR TOR as *lex inferior* (subordinate law). The analysis then applied the *ultra vires* doctrine by comparing the Charter's explicit protective mandate with the authority granted under the AICHR TOR, showing that the TOR's omission of protection mechanisms was jurisprudentially invalid. Finally, the analysis explored the functional and socio-legal impacts of these legal failures, illustrating how combining the non-interference principle with the consensus rule renders human rights interventions systematically impossible against uncooperative member states. While this doctrinal approach inherently relied on publicly available legal texts—acknowledging the non-transparent nature of the 'ASEAN Way' and restricted access to confidential diplomatic preparatory work—this limitation does not undermine the findings. Under international law, formally ratified treaty texts supersede informal political intentions, allowing the *ultra vires* nature of the AICHR TOR to be definitively established based solely on the finalized legal documents.

Research Finding

This section presents empirical findings from doctrinal and socio-legal analyses of the ASEAN human rights framework. To maintain rigorous analytical objectivity, these results are reported strictly on jurisprudential evidence before broader policy discussion. The assessment first explores the normative conflict and the AICHR TOR's explicit ultra vires nature. Subsequently, it examines how foundational ASEAN principles function as a paralyzing legal cage, before concluding with an evaluation of the profound socio-legal impacts these structural failures impose on justice and victimization across Asia.

The Normative Conflict and the Ultra Vires Argument

Table 1 The Hierarchy of Norms in the ASEAN Human Rights Framework

Legal Instrument	Drafting Body	Ratification Process	Normative Status	Legal Function
The ASEAN Charter (2008)	ASEAN Member States (Heads of State)	Ratified by national parliaments/legislatures	Lex Superior (Supreme Constitution)	Establishes the key mandate (Article 14: Promotion and Protection).
The AICHR TOR (2009)	ASEAN Foreign Ministers	Endorsed by Foreign Ministers (No parliamentary ratification)	Lex Inferior (Subordinate Instrument)	Directs the AICHR's specific operational functions and boundaries.

Source: Association of Southeast Asian Nations (2015); ASEAN Intergovernmental Commission on Human Rights (2020).

Table 1 presents the results of the analysis and confirms the constitutional hierarchy in the ASEAN structure between the ASEAN Charter and the AICHR TOR, based on the principles of lex superior and lex inferior. Article 30(2) of the Vienna Convention on the Law of Treaties (VCLT) 1969 defines this connection. To determine the lex superior status of the ASEAN Charter, the current analysis relies on Article 30(2) of the VCLT 1969, which provides that “When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” (United Nations, 2005). Therefore, by adopting a hierarchy clause or a conflict clause, states can express a clear hierarchy among their treaties. In reference to the ASEAN Charter, Article 52 (Legal Continuity) establishes its supremacy over other regional agreements. Article 52(1) provides that “All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid.” Article 52(2) also provides that “In case of inconsistency between the rights and obligations of ASEAN Member States under such instruments and this Charter, the Charter shall prevail.” (Association of Southeast Asian Nations, 2015). Thus, when Article 30(2) of the VCLT 1969 is applied, Article 52 of the ASEAN Charter acts as a reverse conflict clause, making the ASEAN Charter override any earlier regional agreements that conflict with it. Therefore, the Charter takes the position of lex superior, making any pre-existing norms lex inferior.

In the context of the VCLT 1969, Article 52 of the ASEAN Charter reflects the Member States' final will to make the ASEAN Charter the region's lex superior. Through Article 30(2) of the VCLT, the ASEAN Charter overrides any conflicting regional regulations, ensuring that its constitutional principles have ultimate authority over all subsidiary ASEAN instruments.

Therefore, the ASEAN Charter serves as the primary legal authority for all ASEAN organs and sectoral bodies, such as the AICHR, which was created under Article 14. In contrast, the AICHR TOR is an administrative instrument, or *lex inferior*. This is because the ASEAN Foreign Ministers prepared the AICHR TOR, and Parliament never ratified it. The universally accepted legal principle of *lex superior derogat legi inferiori* is that a subordinate administrative text may not reduce, alter, or limit the supreme mandate set forth by its parent constitution. Nevertheless, a line-by-line analysis of the text shows a systemic jurisprudential conflict in this constitutional framework.

Table 2 Analysis of Textual Inconsistencies Between the ASEAN Charter and the AICHR TOR

The Lex Superior Mandate (ASEAN Charter)	The Lex Inferior Derogation (AICHR TOR)	Analysis of Normative Conflict
Article 1(7) explicitly mandates the organization “...to promote and protect human rights and fundamental freedoms.”	While Article 1.1 states the aim “to promote and protect,” Article 1.4 alters this by adding the condition “to promote human rights within the regional context,” thereby prioritizing State sovereignty.	The AICHR TOR introduces unauthorized conditions and limitations not in the Charter. This creates legal loopholes, allowing member states to bypass human rights protection when it conflicts with their sovereign power.
Article 14 dictates that “ASEAN shall establish a human rights body.” The word “shall” imposes a mandatory legal obligation to create an active mechanism.	Article 4.1 restricts the function by stating the body is designed only “to develop strategies for the promotion and protection of human rights.”	This textual modification deliberately downgrades the institution's status. It transforms the AICHR from a functional protection mechanism (as the ASEAN Charter originally intended) into a purely consultative body without enforcement authority.
Article 1(7) legally assigns equal importance and weight to both the “protection” and “promotion” of human rights.	Articles 4.2 to 4.14 demonstrate that over 90% of the provisions focus exclusively on promotional activities, such as educational campaigns and meetings.	The AICHR TOR severely lacks concrete provisions for actual human rights “protection.” It completely omits essential enforcement tools, such as an individual complaint mechanism or independent investigative powers.

Source: Association of Southeast Asian Nations (2015); ASEAN Intergovernmental Commission on Human Rights (2020).

A rigorous textual comparison, as detailed in Table 2, exposes profound normative inconsistencies between the foundational Charter and the subsidiary TOR. While Article 1(7) of the ASEAN Charter explicitly mandates promoting and protecting human rights, Article 1.4 of the AICHR TOR introduces unauthorized conditions that effectively prioritize state sovereignty over human rights protection. Furthermore, Article 14 of the Charter uses the obligatory term “shall” to mandate the establishment of an active human rights body. In contrast, Article 4.1 of the AICHR TOR limits this function to developing strategies, thereby

downgrading the AICHR into a non-enforceable consultative entity. Crucially, while the Charter assigns equal legal weight to both the "protection" and "promotion" of human rights, the AICHR TOR focuses almost exclusively on promotional activities and omits essential enforcement tools such as individual complaint mechanisms or independent investigative powers. These glaring textual derogations conclusively prove that drafting the AICHR TOR constituted an ultra vires act. By systematically stripping away practical protective measures, the Foreign Ministers acted unlawfully, exhibiting complete disregard for the scope of authority granted by the supreme directive of Article 14. Consequently, as severe crimes against humanity unfold, the AICHR remains paralyzed by its own foundational document, capable only of organizing capacity-building workshops rather than providing legal recourse. Thus, the AICHR's failure to intervene in ongoing crises is not merely a political shortcoming, but a strict adherence to a jurisprudentially flawed and ultra vires legal instrument.

The Legal Cage: Non-Interference and Consensus

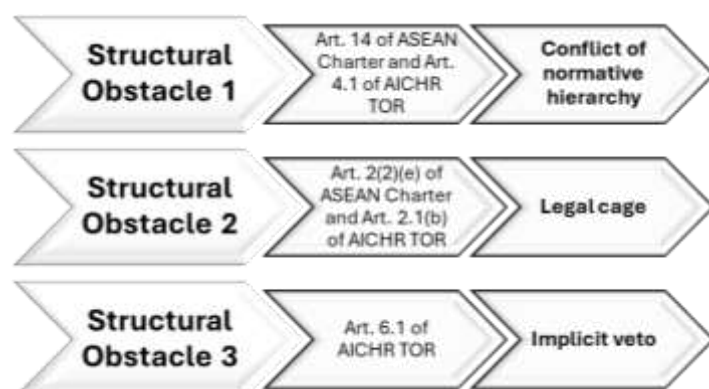


Figure 1 Normative Relationship and Structural Obstacles to Enforcement

Source: Association of Southeast Asian Nations (2015); ASEAN Intergovernmental Commission on Human Rights (2020)

As Figure 1 illustrates, beyond the specific limitations of the AICHR TOR, ASEAN's foundational principles interlock to create a formidable legal cage that effectively neutralizes any remaining enforcement capacity. This structural barrier arises from the convergence of two distinct legal provisions within the ASEAN Charter: Article 2(2)(e), which strictly mandates non-interference in the internal affairs of Member States, and Article 20(1), which requires that all decisions be reached through consultation and consensus. Applying these intertwined principles to human rights interventions creates an insurmountable implicit veto. Because the AICHR operates as an intergovernmental institution reliant exclusively on unanimous consensus, a critical functional paralysis emerges. For instance, in the event of gross human rights violations—such as arbitrary detention, ethnic cleansing, or state-sponsored violence—in Member State “A”, the AICHR possesses absolutely no legal authority to issue a protective statement, condemn the atrocities, or initiate an investigation unless Member State “A” explicitly consents to being investigated. This procedural prerequisite of unanimous consent is an institutionalized mechanism ensuring that an offending state retains the ultimate authority to block its own scrutiny. A profound manifestation of this deliberate limitation is the Rohingya crisis in Myanmar, where the AICHR was legally paralyzed despite urgent appeals from international bodies and civil society networks. Therefore, this scenario represents a rigid, structural legal blockade rather than a standard diplomatic hurdle or a mere preference for silent diplomacy. By weaponizing the principle of non-interference, the consensus requirement successfully shields sovereign states from regional legal accountability, systematically destroying the institution's capacity to enforce human rights norms.

Socio-Legal Barriers to Accountability: Impunity and the Justice Deficit

This research identified jurisprudential weaknesses. For example, the ultra vires TOR and the consensus-based legal cage have significant, visible socio-legal effects in Asian societies that go well beyond procedural legal theory. Assessing these legal texts through a criminological and socio-legal lens shows that ASEAN's legal structure inadvertently protects state-level criminality. By deliberately denying a regional human rights institution its enforcement and investigative authority, it creates socio-legal barriers to accountability. As a result, AICHR does not offer any measures of justice to victims of systemic abuse, extrajudicial murders, or state-sponsored crimes. This dynamic leads to a phenomenon of two-fold victimization. People are first offended by the crimes of the state, and then offended again by the regional human rights system's inability to deliver justice. This institutional imbalance directly raises and legitimizes a local culture of impunity. Criminologically, the AICHR's failure to investigate offending states means they can go about their business with the assurance that they will not face sanctions or legal consequences at the ASEAN level. This assurance of avoiding punishment also encourages state actors to continue their oppressive practices. In this way, this structural legal failure directly causes the continued suffering of vulnerable groups and the widening justice gap in Southeast Asia. Finally, in the current ASEAN system, law serves as an impassable barrier that protects state-level criminality, rather than as a tool to protect human rights.

Conclusion and Discussion

In summary, this research systematically evaluated the AICHR's institutional limitations by rigorously analyzing the normative conflict between the ASEAN Charter and the AICHR TOR through the doctrine of *lex superior derogat legi inferiori*. The findings unequivocally demonstrate a profound constitutional breach. While Article 14 of the Charter expressly directs the AICHR to both promote and protect human rights, the subsequently drafted AICHR TOR unlawfully subverts this supreme directive. By deliberately omitting essential protective mechanisms—such as the authority to receive individual complaints, conduct unannounced fact-finding missions, or initiate independent investigations—the AICHR TOR reduces the institution to a mere consultative entity. Consequently, formulating and adopting the AICHR TOR constitutes an ultra vires act. Rendered jurisprudentially invalid, these subordinate terms of reference possess no legitimate legal force to restrict the higher constitutional mandate. To resolve this, member states could invoke Article 51 of the ASEAN Charter, which governs constitutional interpretation, to seek a binding regional decision confirming this violation (Sookhakich & Limsiritong, 2021). A formal legal declaration recognizing the AICHR TOR as ultra vires would legally compel the ASEAN Summit to nullify these defective provisions. Furthermore, exposing this ultra vires nature fundamentally disrupts the current paradigm of state responsibility in Southeast Asia. Presently, violating states manipulate the ASEAN Way—specifically the non-interference principle (Article 2(2)(e)) and consensus decision-making (Article 20)—to construct an impenetrable legal cage, utilizing their implicit veto to shield domestic crimes from regional oversight. Formally challenging these limitations legally strips away this political shield, delegitimizing states that perpetuate human rights abuses and firmly placing their actions under the intense scrutiny of international human rights law. From a criminological and socio-legal perspective, unlocking this legal cage is imperative to address the profound justice gap and the relentless cycle of victimization deeply embedded in Asian societies. Because the AICHR remains structurally unable to circumvent the implicit veto, victims of severe human rights abuses are systematically denied any viable avenue for regional legal recourse. In jurisdictions where domestic judicial systems are politically compromised or actively complicit in state violence, the absence of an effective regional institution leaves victims completely unprotected, thereby institutionalizing human rights

impunity both nationally and regionally. To prevent future state criminality, the AICHR TOR cannot be remedied through procedural adjustments alone. Crucially, ASEAN must fundamentally transform its decision-making paradigm by elevating the AICHR TOR into a legally binding protocol and implementing a Qualified Majority Voting (QMV) mechanism, specifically activated in cases of gross human rights violations. This structural reform would provide a legitimate legal mechanism to bypass an offending state's veto. Although pursuing such reforms presents immense diplomatic challenges in a region highly sensitive to sovereignty, declaring the restrictive elements of the AICHR TOR ultra vires and introducing QMV are unconditional legal necessities. Only by unequivocally acknowledging this institutional paralysis as a deliberate design failure and pursuing formidable legal solutions can ASEAN successfully transform the AICHR into an enforceable, protective institution that actively dismantles state-sponsored crimes and systemic impunity.

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